NO. 12-56506

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE LUIS MUNOZ SANTOS,

Petitioner-Appellant,

v.

LINDA R. THOMAS, Warden,

Respondent-Appellee.

D.C. No. 2:11-cv-06330-MMM

Opinion filed: March 9, 2015

Panel: Schroeder, Nguyen, CJJ; Zouhary, DJ

APPELLANT'S PETITION FOR PANEL REHEARING AND/OR REHEARING *EN BANC*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE MARGARET M. MORROW
United States District Judge

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

INTRODUCTION

As the record stands, appellant Jose Munoz faces extradition to Mexico based exclusively on accusations gotten by torture.

The Panel twice called this "a tricky issue." (Oral Arg. at 5:10, 25:54) Its solution, however, was to look the other way. It affirmed the extradition judge's decision to consider only the kidnapping accusations against Munoz, ignoring the unrefuted evidence that the accusers were beaten and waterboarded into talking.

The Panel said that, because the accusers later recanted their accusations in addition to describing their torture, the recantations and torture evidence were "inextricably intertwined" and thus the extradition judge could ignore it all.

This baby-with-the-bathwater approach bucks a century of law. Whether Munoz's accusers were tortured is a matter separate from whether Munoz plotted a kidnapping. He wants the torture evidence considered, not the recantations, and he has that right: the torture evidence is "evidence bearing upon the issue of probable cause" and thus admissible. *Collins v. Loisel*, 259 U.S. 309, 316 (1922).

Extradition judges routinely consider evidence of torture-procured charges without delving into mini-trials on the accused's guilt. The judge in *Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2005) (en banc) (per curiam), did exactly that, and this Court endorsed his "careful, incident-by-incident analysis." *Id*. at 748.

The Panel's ruling – it's OK to ignore evidence of torture – is unprecedented and violates both *Collins* and *Barapind*. It will also embolden countries that torture, and then use U.S. courts to extradite people based on torture-gotten claims, to keep doing so. This case should be reheard.

STATEMENT OF FACTS

A. The Government Proffers Two Statements Supporting Extradition

The question in Munoz's case has been whether there's evidence that is "sufficient, according to the laws of the requested Party [the U.S.] to justify the committal for trial of the person sought." Art. 3, Extradition Treaty Between the United States of America and the United Mexican States, signed May 4, 1978 ("Treaty"), 31 U.S.T. 5059. "[C]ourts have interpreted this provision in similar treaties as requiring a showing by the requesting party [Mexico] that there is probable cause to believe that the accused has committed the charged offense." *Quinn v. Robinson*, 783 F.2d 776, 783 (9th Cir. 1986). "[T]he extradition court [must] conduct essentially the same preliminary inquiry typically required for issuance of a search warrant or an arrest warrant for crimes committed in this country— a familiar task for any magistrate judge." *Haxhiaj v. Hackman*, 528 F.3d 282, 287 (4th Cir. 2008).

Though much evidence has been proffered in this case, which began in August 2006, the district court found that two – and only two – statements generated probable cause to think Munoz is guilty of the kidnapping charge.

Fausto Rosas and Jesus Hurtado each made a statement accusing Munoz of plotting with them to kidnap and ransom a wealthy Mexican woman. Though the government offered statements from other people, the district court found – and the government did not dispute on appeal – that "[w]ithout Hurtado and Rosas, [] the remaining witnesses' statements are too thin a reed on which to base a showing of probable cause." (Appellant's Excerpts of Record ("ER") 18 n.41)

B. The Parties Proffer Unrefuted Evidence that the Two Statements Were Gotten by Torture

Munoz and the government each proffered evidence that Rosas's and Hurtado's accusations against Munoz are the products of torture.

Two months after Rosas signed his statement accusing Munoz, he was given a lawyer and brought before a Mexican judge. He there explained that he "was forced to sign" by police who were "beating and threatening" him and who told him to sign "if [he] didn't want anything bad [to] happen to [his] family." (ER 110-111) When asked if he stood by or retracted the accusation, he said "I retract." (ER 111) Rosas later elaborated on his torture: "[T]hey took me to a sort of cell, without lights, and with only a chair. They bound my legs to the legs of the chair, and they bound my hands behind me to the back of the chair. Then he bound me around my head and entire face. Then he put a bag over my head, and one of them came up in front of me and began to strike me with an open hand in my chest. . . . They were beating me until they forced me to sign it." (ER 169-170)

When Hurtado was brought before a Mexican judge, roughly a week after signing his accusation, he explained:

> [T]hey started hitting me on the head. . . . [T]hey covered my face with a bag, tightening it so that I could not breath[e]. . . . They tortured me for a while, and they put me down on the floor, and sprayed me [with] water in both nose and mouth, laying down on the floor, and one stepped on my stomach. . . . [T]hey threatened me by telling me that they were going to give me my daughter in pieces. . . . [T]hey turned me around on my back and began to spray water in my mouth and nose, they covered my mouth and nose with a rag. . . . [T]hey kept torturing me day and night, and they pointed guns [at] my head.

(ER 105-106) While making this statement to the court, the clerk noted Hurtado had "minor bruises on both cheekbones" and "complain[ed] about left earache, as well as pain on the right foot." (ER 108) Hurtado said he did "not ratify" the accusation. (ER 105) He later elaborated: "I was tortured, bags were placed over my face, I was punched in the stomach, I received death threats, water was poured into my nose and mouth as I was lying on my back." (ER 196) Again: "They told me that if I did not sign these papers, they were going to kill my daughter, put her in a box and give her to my son as a birthday gift." (ER 210-211)

In the nearly 9 years it has had to do so, Mexico has proffered nothing – no police affidavits, no medical records, nothing – refuting this evidence of torture.

C. The Government Tells the Court to Ignore the Torture Evidence, and the Court Complies

Claiming there's no Ninth Circuit "holding that evidence tending to show that the requesting country's proofs were [] obtained by torture is admissible," the government told the extradition judge to ignore the evidence of torture. *United States v. Munoz Santos*, C.D.Cal. 06-5092, Docket Entry 147 at 17-18.

The judge did so, saying the torture evidence was "offered to contradict the version of facts set forth in the inculpatory statements and to provide a competing, conflicting version of the facts." (ER 64) Because factual disputes as to guilt are for trial, he said the evidence of "torture or coercion is inadmissible and has not been considered in determining probable cause." (ER 64) Considering only the accusations against Munoz, the judge found probable cause to extradite.

The district judge, reviewing the extradition magistrate on habeas, approved

the decision to ignore the torture evidence but on a different ground. She didn't say Rosas's and Hurtado's accounts of being tortured offered a "competing, conflicting version" of the alleged kidnapping plot (as, indeed, they didn't).

The district judge recognized that evidence of an accusation being tortured out of the accuser "is not inherently 'contradictory,' since it does not present a different version of facts from that presented by the [accusation]. . . . Instead, it addresses the reliability of the incriminating statements the government has presented and questions their competence." (ER 11) "Whether the inculpatory statement or the recantation is the more credible is not a decision the extradition court can make. It can, however determine that torture or other forms of duress render the government's inculpatory evidence unreliable." (ER 12)

Nevertheless, the judge approved the decision to ignore the torture evidence:

> In the court's view . . . , even if evidence related to Hurtado's and Rosas's torture is admissible, it is inextricably intertwined with their recantations. Their testimony can be summarized as follows: "I was tortured when I gave my inculpatory statements and I completely recant and contradict my earlier recitation of events." Given this, it is difficult, if not impossible, to distinguish between their statements regarding torture, on the one hand, and their recantation of the incriminating statements, on the other. Parsing the statements would almost certainly require the extradition court to determine whether the recantations are more reliable than the original inculpatory statements. . . . [It] would inevitably require the extradition court to weigh conflicting versions of the facts. . . . As a consequence, the court concludes that the extradition court properly excluded the evidence.

(ER 19-20)

D. The Panel Finds "No Error" in Ignoring the Torture Evidence

"We find no error," the Panel said, because the torture evidence was

"inextricably intertwined with the witnesses' recantations. As a result, considering the witnesses' claims of torture would have required the magistrate judge, serving as the extradition court, to weigh conflicting evidence and make credibility determinations." (Exhibit A at 3)

The Panel nonetheless noted that "several extradition courts in this Circuit have . . . considered allegations of torture." (Exhibit A at 13) "Under the appropriate circumstances," the Panel said without elaboration, "an extradition court *may* exercise its discretion to consider allegations of torture." (Exhibit A at 14) (emphasis in original) Denied this consideration, Munoz seeks rehearing.

REASONS FOR GRANTING REHEARING

I. By Overlooking Two Critical Points, the Panel Rendered a Decision in Conflict with Supreme Court and *En Banc* Authority

First, the Panel said "Munoz's only challenge to the extradition court's probable cause determination is based on the exclusion of [Rosas's and Hurtado's] recantations." (Exhibit A at 12) That's incorrect.

Munoz didn't say the judge erred by ignoring the recantations. He said the error was "refus[ing] to consider any of the torture evidence." (Appellant's Opening Brief ("AOB") 16) "Evidence was proffered – including by the government – that the two statements against Munoz were obtained by torture. The magistrate refused to consider this evidence and the district judge endorsed that refusal. This was error." (AOB 17) Munoz asked the Panel to "return the case to the magistrate judge for consideration of the torture evidence." (AOB 30) At oral argument, the defense confirmed: "We're not asking the court to adjudicate

whether Mr. Munoz is guilty of the kidnapping. We're simply asking the court to consider the evidence that the only two allegations against him were procured by torture." (Oral Arg. at 6:42) Munoz didn't ask for consideration of the recantations. Indeed, the "recantations" were all of one sentence long. *See* ER 111 (Rosas: "I retract."), 105 (Hurtado: "I do not ratify my ministerial statements.").

The question here has been "whether there is competent evidence to justify holding the accused to await trial, and not [] whether the evidence is sufficient to justify a conviction." *Collins v. Loisel*, 259 U.S. 309, 316 (1922). A recantation goes to guilt because it says: "I know I said he did it, but really he didn't do it." This prompts exactly the question – Did he do it? – that's meant for trial.

Evidence of an accuser being tortured is a different animal. Such evidence might or might not go to guilt (torture can yield both truth and falsehood), but it always goes to how the accusation was obtained. And if it was obtained by torture, it's no good: true or not, it's not competent and doesn't generate probable cause. *See, e.g.*, *Crowe v. County of San Diego*, 608 F.3d 406, 433 (9th Cir. 2010) ("[C]oerced confessions are legally insufficient and unreliable and thus cannot factor into the probable cause analysis."); *Livers v. Schenck*, 700 F.3d 340, 358 (8th Cir. 2012) ("No reasonable officer could believe statements from a coerced confession could alone provide probable cause."); *United States v. Lui Kin-Hong*, 110 F.3d 103, 122 (1st Cir. 1997) (A "confession obtained by duress is inherently unreliable and would be given little weight even if the confession were authenticated."); *United States v. Rutledge*, 900 F.2d 1127, 1129 (7th Cir. 1990) ("[C]onfessions extracted by torture are excluded.").

Evidence of torture-procured accusations therefore has to be considered in extradition cases because it's "evidence bearing upon the issue of probable cause." *Collins*, 259 U.S. at 316. In *Collins*, the Supreme Court differentiated between "contradictory" and "explanatory" evidence offered in extradition cases. Evidence contradicting guilt is inadmissible because disputes over guilt are for trial; on the other hand, evidence explaining why there's no probable cause is admissible because deciding if probable cause exists is what an extradition hearing's all about.

The *Collins* Court thus approved an extradition judge allowing the accused "to testify fully, to things which might have explained ambiguities or doubtful elements in the prima facie case made against him. In other words, he was permitted to introduce evidence bearing upon the issue of probable cause," whereas "[t]he evidence excluded related strictly to the defense." *Id*. at 315-316. "The distinction between evidence properly admitted in behalf of the defendant and that improperly admitted is drawn in *Charlton v. Kelly*, [229 U.S. 447 (1913)], between evidence rebutting probable cause and evidence in defense." *Id*. at 316. *See also Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978) (The accused "is not permitted to introduce evidence on the issue of guilt or innocence but can only offer evidence that tends to explain the government's case of probable cause.").

Though an accused can't introduce evidence contradicting guilt, he may offer evidence explaining that the allegations – though seemingly creating probable cause – fall short. That's just what Munoz did: the unrefuted evidence of Rosas's and Hurtado's torture was offered to explain that, even if true, their accusations don't generate probable cause. This is just the kind of evidence that's admissible.

Second, the Panel said the torture evidence could be ignored because it was "inextricably intertwined" with Rosas's and Hurtado's recantations. That's also incorrect: whether Rosas and Hurtado were tortured is a question wholly discrete from whether they had earlier plotted a kidnapping with Munoz.

Extradition judges can, and do, analyze discrete matters discretely. They routinely consider evidence that an accusation was procured by torture, which goes to probable cause, without straying into matters like a recanted accusation, which goes to guilt. As the Panel acknowledged, "several extradition courts in this Circuit have . . . considered allegations of torture." (Exhibit A at 13) *See Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1008 (9th Cir. 2000) ("Cornejo-Barreto introduced evidence that he was arrested and tortured by the State Judicial Police . . . . To isolate any possible taint the alleged torture could have on the evidence supporting the probable cause determination, the judge considered the sufficiency of the evidence without the challenged confessions."), *overruled on other grounds*, *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (en banc); *Mainero v. Gregg*, 164 F.3d 1199, 1206 (9th Cir. 1999) ("Both the magistrate judge and the district court fully and carefully considered the recantations [detailing torture], and both acknowledged that the suggestion of torture is present in the record . . . . [T]he magistrate did not clearly err in finding there was no reliable evidence of torture."), *superseded by statute on other grounds*, Pub. L. No. 105-277, § 2242; *Garcia v. Benov*, 715 F.Supp.2d 974, 995 n.19 (C.D.Cal. 2009) ("[C]ourts must decide whether evidence supporting probable cause is credible in light of allegations that the evidence was obtained through torture by foreign officials.").

Perhaps the best example is *Barapind*, where the extradition judge differentiated between evidence of torture and evidence of a recanted accusation.

India wanted to extradite Barapind on a bevy of charges. He first made a "general challenge" that "India's evidence against him was incompetent" because charges had been fabricated and/or gotten by torture. *Barapind v. Enomoto*, 400 F.3d 744, 748 (9th Cir. 2005) (en banc) (per curiam). In rejecting this challenge, this Court explained that the "extradition court [] conducted a careful, incident-by-incident analysis as to whether there was impropriety on the part of the Indian government. Its findings that the evidence regarding [three charges] was not the product of fabrication or torture were not clearly erroneous." *Id*.

The Court then addressed Barapind's *separate* claim that probable cause for one of those three charges ("FIR 100") was lacking because the accuser, Makhan Ram, recanted his accusation. The extradition judge had ruled "'the credibility of Makhan Ram's recantation cannot be determined without a trial,' which would exceed the limited mandate of an extradition court in making a determination of probable cause, as opposed to ultimate guilt." *Id*. at 749 (citation omitted). This Court affirmed: "Makhan's more recent affidavit constituted conflicting evidence, the credibility of which could not be assessed without a trial." *Id*. at 750.

A recantation – "I know I said he did it, but really he didn't do it" – is excluded because it goes to guilt, but a general challenge – "The accusations were gotten by torture" – warrants "a careful, incident-by-incident analysis as to whether there was impropriety." *Id*. at 748. Indeed, India had sought extradition on more than the three charges and, on one of them ("FIR 220"), the judge refused to allow

extradition given evidence of torture:

> Barapind submits three affidavits from [three people] that detail their observations how [the accuser] was tortured while in police custody. . .
>
> India's only evidence for [this charge] is [the accuser's] confession allegedly identifying Barapind as an accomplice, which according to three sworn witnesses was extracted through torture, and is otherwise uncorroborated. Probable cause cannot be based on evidence procured by torture, which is incompetent if obtained by unlawful means. India does not rebut the evidence of [the accuser's] torture. . .
>
> A credibility determination can be made that evidence procured by the torture of [the accuser] is not competent. India offers no contrary evidence. It is more probably true than not true that [the accuser] was tortured (see also post-mortem report), that his identification of Barapind was involuntarily obtained in violation of universally recognized human rights, and should be excluded from the probable cause determination.

In re Extradition of Singh, 170 F.Supp.2d 982, 1029 (E.D.Cal. 2001).

As the three-judge panel observed before the case went *en banc*, Barapind's judge "reviewed each [charge] individually, as was his exclusive province, and where there was compelling and material evidence of fabrication, coercion, and torture, he appropriately found the totality of the evidence to be too unreliable to support probable cause. This discriminating approach is all the law requires." *Barapind v. Enomoto*, 360 F.3d 1061, 1073 (9th Cir. 2004).

Nowhere in *Barapind* did the judge, or this Court, ignore evidence of torture. On the contrary, where there was evidence of "impropriety on the part of the Indian government" in obtaining the charges against Barapind, such as through "fabrication or torture," that evidence was considered. *Barapind*, 400 F.3d at 748.

Munoz seeks the same consideration of the torture evidence in his case, which can be assessed discretely: whether Rosas was tied to a chair and beaten, and whether Hurtado was brutalized, waterboarded and had his daughter's life threatened, has nothing to do with whether they earlier plotted with Munoz to kidnap. The torture evidence isn't "inextricably intertwined" with the recantations.

And, contrary to the Panel's claim, Munoz never "concede[d] that the district court correctly characterized the evidence as 'inextricably intertwined'" (Exhibit A at 13) such that the torture evidence could be ignored. "Inquiring whether [the accusations] were gotten by torture," Munoz said, "does not require a mini-trial on the kidnapping charge because the torture evidence concerns how the allegations against [him] were obtained, not whether they are true." (AOB 16) Even if they are true, he can't be extradited on tainted allegations: there has to be probable cause under U.S. law, *see* Treaty, Art. 3, and U.S. law doesn't recognize allegations gotten by torture. *See Crowe*; *Livers*; *Lui*; *Rutledge*; *United States v. Tavares*, 705 F.3d 4, 23 (1st Cir. 2013) ("'It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case.'"); *Clanton v. Cooper*, 129 F.3d 1147, 1158 (10th Cir. 1997) (same).

The Panel emphasized that Rosas and Hurtado recanted their accusations in addition to detailing their torture. But would it matter if they *hadn't* recanted? No: whether an accusation is recanted or not, evidence of its being the product of torture is "evidence bearing upon the issue of probable cause" and thus admissible. *Collins*, 259 U.S. at 316. *See also Crowe*; *Livers*; *Lui*; *Rutledge*; *Tavares*; *Clanton*.

Munoz doesn't claim "an extradition court must accept as true allegations of torture whenever they are raised." (Exhibit A at 14) All he asks is what's asked of any extradition judge: "to determine whether there is competent evidence to justify holding the accused to await trial." *Collins*, 259 U.S. at 316.

If this requires the magistrate to "evaluate the veracity of" and "weigh" the torture evidence (Exhibit A at 13), that's because that's his job. "Inherent in the probable cause standard is the necessity of a determination that the evidence is both sufficiently reliable and of sufficient weight." *Lui*, 110 F.3d at 120. This is "a familiar task for any magistrate judge," *Haxhiaj*, 528 F.3d at 287, who "must judge for himself the persuasiveness of the facts relied upon by a complaining officer to show probable cause," *Giordenello v. United States*, 357 U.S. 480, 486 (1958), taking into account evidence that "explain[s] what is said by the witnesses for the prosecution." *Charlton*, 229 U.S. at 462.

This is just what the judge did in *Barapind*: after considering the torture evidence as to FIR 220, he made a "credibility determination" that it was "more probably true than not true that [the accuser] was tortured" and thus that the accusation "should be excluded from the probable cause determination." *Singh*, 170 F.Supp.2d at 1029. To have done what the Panel allowed here – simply ignore the evidence of torture – would have turned the probable-cause inquiry into a foregone conclusion and reduced the judge to the government's "rubber stamp." *Aguilar v. Texas*, 378 U.S. 108, 111 (1964).

"The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial," *Collins*, 259 U.S.

at 316, and the accused has a corresponding right "to introduce evidence bearing upon the issue of probable cause." *Id*. This process was honored in *Barapind*, where the accused proffered evidence of torture-procured accusations and the judge "conducted a careful, incident-by-incident analysis as to whether there was impropriety." *Barapind*, 400 F.3d at 748. Judges may not simply close their eyes to evidence of torture.

To the extent there's any confusion on this point, *see* Exhibit A at 10 ("[E]xtradition courts do not weigh conflicting evidence in making their probable cause determinations"), now's the time to resolve it with a clear rule: evidence of torture can't just be ignored. An extradition court must do its job by considering such evidence and deciding for itself whether the government has proffered adequate, reliable and competent allegations amounting to probable cause.

Looking the other way is no answer.

II. Besides Conflicting with *Collins* and *Barapind*, the Panel's Ruling Involves a Matter of Exceptional Importance

"[T]orture, and evidence obtained thereby, have no place in the American system of justice." *United States v. Abu Ali*, 528 F.3d 210, 232 (4th Cir. 2008). As the record stands, however, Munoz faces extradition based exclusively on accusations gotten by torture.

This isn't a case where the judge considered the submissions and found "no reliable evidence of torture." *Mainero*, 164 F.3d at 1206. Nor is it one where, "[t]o isolate any possible taint the alleged torture could have on the evidence supporting the probable cause determination, the judge considered the sufficiency

of the evidence without the challenged confessions." *Cornejo-Barreto*, 218 F.3d at 1008. The judge here simply looked the other way, refusing to consider unrefuted evidence that the allegations supporting extradition are the products of torture.

This Court has never before endorsed such a practice, and for good reason. Besides conflicting with *Collins* and *Barapind*, the Panel's ruling will encourage countries that torture, and then seek extradition based on torture-procured charges, to keep doing so.

Perhaps aware of the aberrant nature of its ruling, and of the dangerous precedent it was setting, the Panel said: "Under the appropriate circumstances, an extradition court *may* exercise its discretion to consider allegations of torture." (Exhibit A at 14) (emphasis in original)

Yet saying a judge may do the exact opposite of what the judge did here, in unspecified "appropriate circumstances," promotes neither clarity nor consistency. Judges who opt to consider evidence of torture will prevent unlawful extraditions, whereas those who ignore it will create a conflicting body of caselaw while giving countries that torture no reason to stop— no reason to stop torturing, and no reason to stop coming into U.S. courts with unclean hands and an expectation of impunity.

There's no need to go down that road. This Court can, and should, draw a bright line here and now: a judge may not ignore evidence that the accusations supporting someone's extradition were gotten by torture.

CONCLUSION

The Court should grant rehearing. Because there is unrefuted evidence, which the judge ignored, that Munoz's extradition certification rests on accusations gotten by torture, the Court should reverse the judgment below, vacate the certification and remand this case for further proceedings.

Respectfully submitted,

HILARY L. POTASHNER
Acting Federal Public Defender

DATED: May 14, 2015

By *s/ Matthew B. Larsen*
MATTHEW B. LARSEN
Deputy Federal Public Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1, I certify that this petition is proportionally spaced, has a typeface of 14 points or more, does not exceed 15 pages in substance, and contains approximately 4,240 words.

DATED: May 14, 2015

s/ Matthew B. Larsen
MATTHEW B. LARSEN

EXHIBIT A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE LUIS MUNOZ SANTOS, *Petitioner-Appellant*, v. LINDA R. THOMAS, Warden, *Respondent-Appellee*.	No. 12-56506 D.C. No. 2:11-cv-06330-MMM OPINION

Appeal from the United States District Court
for the Central District of California
Margaret M. Morrow, District Judge, Presiding

Argued and Submitted
November 20, 2014—Pasadena, California

Filed March 9, 2015

Before: Mary M. Schroeder and Jacqueline H. Nguyen,
Circuit Judges, and Jack Zouhary, District Judge.[*]

Opinion by Judge Nguyen

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[*] The Honorable Jack Zouhary, District Judge for the U.S. District Court for the Northern District of Ohio, sitting by designation.

SUMMARY[**]

Habeas Corpus/Extradition

The panel affirmed the district court's denial of habeas relief from a magistrate judge's order certifying Jose Munoz Santos' extradition to Mexico on kidnapping charges.

The panel held that the magistrate judge, serving as the extradition court, properly excluded from its probable cause determination evidence that two witnesses, who had provided key inculpatory statements, later recanted and stated their statements were obtained by torture. The panel explained that in a case like this one, where torture allegations are inextricably intertwined with the witnesses' recantations, the evidence was properly excluded because its consideration would have required a mini-trial on whether the witnesses' initial statements were procured by torture.

The panel concluded that the district court properly denied the habeas petition because the extradition court's probable cause determination was supported by competent evidence.

COUNSEL

Matthew B. Larsen (argued), Deputy Federal Public Defender, and Sean K. Kennedy, Federal Public Defender, Los Angeles, California, for Petitioner-Appellant.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Aron Ketchel (argued), and Robert E. Dugdale, Chief, Criminal Division, Assistant United States Attorneys, and André Birotte Jr., United States Attorney, Los Angeles, California, for Respondent-Appellee.

OPINION

NGUYEN, Circuit Judge:

Jose Munoz Santos ("Munoz") appeals the district court's denial of habeas relief from a magistrate judge's order certifying his extradition to Mexico on kidnapping charges. He argues that the magistrate judge erroneously excluded evidence that two witnesses, who had provided key inculpatory statements, later recanted and stated that their statements were obtained by torture. We find no error. The evidence of torture was, as Munoz concedes, inextricably intertwined with the witnesses' recantations. As a result, considering the witnesses' claims of torture would have required the magistrate judge, serving as the extradition court, to weigh conflicting evidence and make credibility determinations. Under these circumstances, the extradition court properly excluded this evidence. We affirm.

BACKGROUND

A. Evidence Supporting the Extradition Certification

In support of its extradition request, the government of Mexico provided statements from five witnesses implicating Munoz in the alleged kidnapping for ransom of Dignora Hermosillo Garcia ("Hermosillo") and her two children. According to Hermosillo, she and her two young daughters

were abducted from their home in the evening of August 18, 2005, by a masked man holding a gun. She later identified Fausto Librado Rosas Alfaro ("Rosas") as the masked gunman. Rosas forced Hermosillo and her children into Hermosillo's jeep and drove them away at high speed. Rosas tugged on his mask as he drove and Hermosillo saw that he had a large mark, like a mole or a scar, on his nose. Rosas asked her for information about her husband's work and daily routine, and later, for her bank card PIN number. At one point, Rosas stopped the vehicle to tape his captives' mouths, hands, and feet. He eventually took one child out of the car and abandoned her, and later did the same to the second child. After more driving, he left Hermosillo tied up by a tree. The younger of Hermosillo's daughters was later found dead. Hermosillo's husband, Roberto Castellanos Meza ("Castellanos"), confirmed that his wife and daughters went missing in the evening of August 18, 2005.

Rosas gave a statement, dated March 27, 2006, admitting to being the masked gunman who abducted Hermosillo and her daughters. He identified petitioner Munoz as a chief orchestrator of the kidnapping, and attested to the participation of Jesus Servando Hurtado Osuna ("Hurtado"). Hurtado also gave a statement, dated March 14, 2006, in which he admitted to his role as the lookout on the day of the kidnapping. Hurtado corroborated Rosas' identification of Munoz as an orchestrator of the scheme.

Finally, the Mexican government provided a statement of Benigno Andrade Hernandez ("Andrade"), asserting that Rosas and Munoz approached him in early August 2005 to help them pull a "job" that involved asking "Beto" for 2 million pesos. The parties do not dispute that "Beto" is a

common nickname for "Roberto," the first name of Hermosillo's husband.

Based on these five statements—of Hermosillo, Castellanos, Rosas, Hurtado, and Andrade—the extradition court found that there was probable cause to believe that Munoz was guilty of the alleged kidnapping, and accordingly certified extradition. *In re Extradition of Santos*, 795 F. Supp. 2d 966, 979–83 (C.D. Cal. 2011).

B. Excluded Statements

In certifying extradition, the extradition court excluded from its consideration the following six statements—four from Hurtado, and two from Rosas. *Id.* at 987–90.

On March 22, 2006, Hurtado stated that he "do[es] not ratify" his prior statement implicating Munoz because it was signed "upon torture," and is "false." The remainder of the statement details the torture and other abuse that he suffered. In a statement dated May 25, 2006, Hurtado stated that his prior statement of October 12, 2005, was made "under torture."[1] Hurtado also denied any involvement in the alleged kidnapping. Next, on November 21, 2006, Hurtado asserted that on August 18, 2005 (the day of the alleged kidnapping), a taxi driver took him to a location where he had been performing carpentry work. He stated that he was tortured,

[1] The extradition court did not address Hurtado's October 12, 2005 statement, which contains a dramatically different description of the events on the day of the alleged kidnapping, but also makes no allegations of torture. Munoz does not contend that the extradition court's silence as to this statement constitutes error. We therefore express no view on the significance, or lack thereof, of Hurtado's October 12, 2005 statement.

and presented with a written statement, which he signed. He was told that he would be killed if he changed his statement. Finally, on June 10, 2009, Hurtado stated that he does not know Munoz or Rosas. He also renewed his claims that he was subjected to torture and beatings.

Similarly, Rosas stated on May 25, 2006, that he was "forced to sign" his prior statement implicating Munoz and others in the alleged kidnapping, under "physical and oral" pressure, including threats to the wellbeing of his family. Rosas added that he wished to "retract" his prior statement. On June 20, 2006, Rosas elaborated on the threats made against his family, and "den[ied] the parts" of his prior statement that implicated him in the kidnapping.

The extradition court excluded these statements from its probable cause determination. Relying on *Barapind v. Enomoto*, 400 F.3d 744, 749 (9th Cir. 2005) (en banc) (per curiam), the extradition court stated:

> recantation evidence is contradictory evidence, and . . . the complex, nuanced fact-intensive inquiry into the comparative reliability of inculpatory statements and recantations, including the circumstances under which the statements were obtained, is appropriately reserved for determination by courts of the requesting state, which have access to the full panoply of evidence.

In re Extradition of Santos, 795 F. Supp. 2d at 989 (citing *Barapind*, 400 F.3d at 749).

Munoz then petitioned for a writ of habeas corpus in the district court. He argued that the extradition court's probable cause determination was not supported by competent evidence because it failed to consider evidence of torture. The district court denied relief, concluding that Rosas' and Hurtado's assertions of torture were "inextricably intertwined" with their recantations and therefore were properly excluded. This appeal followed.

JURISDICTION AND STANDARD OF REVIEW

The extradition court had jurisdiction pursuant to 18 U.S.C. § 3184. The district court had jurisdiction pursuant to 28 U.S.C. § 2241(a), and we have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253(a). As relevant here, "[t]he district court's habeas review of an extradition order is limited to whether . . . there is any competent evidence supporting the probable cause determination of the [extradition court]." *Vo v. Benov*, 447 F.3d 1235, 1240 (9th Cir. 2006) (internal quotation marks omitted). We review de novo the district court's decision denying a habeas petition. *Prasoprat v. Benov*, 421 F.3d 1009, 1013 (9th Cir. 2005).

DISCUSSION

A. Limited Nature of Extradition Proceedings

Extradition from the United States begins when a foreign nation lodges a request directly with the United States Department of State. *Vo*, 447 F.3d at 1237. After the State Department evaluates whether the request falls within the scope of the relevant extradition treaty, a United States Attorney seeks an arrest warrant in federal district court for the person sought. *Blaxland v. Commonwealth Dir. of Pub.*

Prosecutions, 323 F.3d 1198, 1207 (9th Cir. 2003). If a judicial officer—usually a magistrate judge—finds that there is probable cause to "sustain the charge under the provisions of the proper treaty or convention," 18 U.S.C. § 3184, the officer certifies to the Secretary of State that the person is extraditable, *Blaxland*, 323 F.3d at 1208.

Extradition proceedings are limited affairs, akin to "preliminary examinations . . . for the purpose of determining whether a case is made out which will justify the holding of the accused." *Charlton v. Kelly*, 229 U.S. 447, 460 (1913) (quoting *Benson v. McMahon*, 127 U.S. 457, 463 (1888)). A person facing extradition may present evidence that "explains away or completely obliterates probable cause . . . whereas evidence that merely controverts the existence of probable cause, or raises a defense, is not admissible." *Mainero v. Gregg*, 164 F.3d 1199, 1207 n.7 (9th Cir. 1999), *superseded by statute on other grounds*, Pub. L. No. 105-277, § 2242. This rule rests on the principle that a foreign government seeking extradition should not be forced "to produce all its evidence [before the extradition court in the United States], both direct and rebutting, in order to meet the defense thus gathered from every quarter," thereby converting the extradition proceeding "into a full trial on the merits." *Collins v. Loisel*, 259 U.S. 309, 316 (1922) (quoting *In re Wadge*, 15 F. 864, 866 (S.D.N.Y. 1883)). Thus, although "[a]dmission of evidence proffered by the fugitive at an extradition proceeding is left to the sound discretion of the court," the exercise of that discretion is "guided of course by the principle that evidence of facts contradicting the demanding country's proof or establishing a defense may properly be excluded." *Hooker v. Klein*, 573 F.2d 1360, 1369 (9th Cir. 1978).

B. "Explanatory" versus "Contradictory" Evidence

Courts have struggled to explain the distinction between admissible "explanatory" or "obliterating" evidence on the one hand, and inadmissible "contradictory" evidence on the other. *See, e.g.*, *In re Extradition of Strunk*, 293 F. Supp. 2d 1117, 1122 (E.D. Cal. 2003) (describing the distinction between these types of evidence as "metaphysical"). We need not wade into that issue in great depth, however, as our decision in *Barapind* largely guides our analysis in this case.

In *Barapind*, a district judge, sitting as an extradition court pursuant to 18 U.S.C. § 3184, certified Kulvir Singh Barapind's extradition to India. 400 F.3d at 746–47. The government of India sought Barapind's extradition due to his involvement in several incidents as a member of the All India Sikh Student Federation, a group "dedicated to establishing an independent sovereign Sikh nation." *Id.* at 747. In one of the incidents, Barapind allegedly "drove a scooter while a gunman riding with him killed one man and wounded another." *Id.* at 749. India relied heavily on the affidavit of Makhan Ram, a witness who identified Barapind as the driver of the scooter. *In re Extradition of Singh*, 170 F. Supp. 2d 982, 1004–05, 1024 (E.D. Cal. 2001).

In the extradition court, Barapind offered another affidavit from Ram, in which Ram "denie[d] ever having made a statement implicating Barapind or having seen him at the scene of the attack." *Id.* at 1024. The extradition court noted Ram's "potential bias against India" based on a claim that he previously had been falsely accused of a crime by the police. *Id.* The court also pointed to a lack of information concerning the circumstances under which the subsequent affidavit was taken, and about Ram's "background or

political views to enable evaluation of his motives and possible bias." *Id.* The extradition court then certified Ram's extradition, concluding that Ram's "recantation is conflicting and inconsistent with his earlier alleged statements," and that, "[u]nder all the circumstances, the credibility of Makhan Ram's recantation cannot be determined without a trial." *Id.*

We affirmed the certification of extradition as to the charges relating to the above incident. In an en banc ruling, we held that an extradition court may properly exclude recantations or other conflicting statements if consideration of such evidence would require the court to weigh conflicting evidence or make credibility determinations. *Barapind*, 400 F.3d at 749–50; *see also Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir. 1986) (noting that an extradition court "does not weigh conflicting evidence and make factual determinations"). We concluded:

> The extradition court was supported by competent evidence in finding that Barapind did not obliterate India's showing of probable cause, as [Ram's] more recent affidavit constituted conflicting evidence, the credibility of which could not be assessed without a trial. Because extradition courts do not weigh conflicting evidence in making their probable cause determinations, we find no basis for overturning the extradition court's decision that probable cause of Barapind's guilt existed . . . .

Barapind, 400 F.3d at 749–50 (citation, internal quotation marks, and brackets omitted).[2]

C. The Recantation Evidence was Properly Excluded

Here, like Ram's second affidavit in *Barapind*, the subsequent statements of Rosas and Hurtado are recantations; they directly contradict or otherwise challenge these witnesses' initial inculpatory statements.[3] Rosas stated that he wished to "retract" his prior statement, and that he "den[ied]" the parts of the statement that implicated him. Hurtado asserted that he "do[es] not ratify" his initial statement, had "nothing to do" with the alleged kidnapping, was performing carpentry work on the day of the alleged kidnapping, and did not know Munoz or Rosas. Determining whether to credit these subsequent statements or Rosas' and Hurtado's initial inculpatory statements would have required the extradition court to weigh conflicting evidence and make credibility findings. We therefore conclude that the

[2] *Barapind*'s analysis of recantation evidence is largely consistent with the approach of other circuit courts that have addressed this issue. *See Hoxha v. Levi*, 465 F.3d 554, 561–62 (3d Cir. 2006) (holding that the extradition court did not abuse its discretion in excluding a recantation given that the original statement was independently corroborated, and the recantation "provided an alternative and contradictory narrative that can properly be presented at trial"); *Eain v. Wilkes*, 641 F.2d 504, 511–12 (7th Cir. 1981) (holding that the extradition court properly excluded statements offered by a person challenging extradition because the statements "tend to contradict or challenge the credibility of the facts implicating petitioner," and that "such a contest should be resolved at trial" in the country seeking extradition).

[3] A recantation is a "retraction" or a "disavowal." *Recantation*, Oxford English Dictionary, www.oed.com/view/Entry/159345?redirectedFrom=recantation#eid (last visited Feb. 2, 2015).

extradition court properly excluded these subsequent statements because they constitute inadmissible recantations. *See Barapind*, 400 F.3d at 749–50.[4] Since Munoz's only challenge to the extradition court's probable cause determination is based on the exclusion of these recantations, we likewise conclude that the probable cause determination was supported by competent evidence. *Cf. Quinn*, 783 F.2d at 815 ("[O]n review we can determine only whether, because of an absence of competent evidence, the magistrate's [probable cause] determination is wrong as a matter of law.").

Munoz argues that two of the challenged statements—Rosas' statement of May 25, 2006, and Hurtado's statement of March 22, 2006—offer no alternate factual account of the kidnapping to compete with the version of events relied on by Mexico in support of its extradition request. According to Munoz, the recanting statements should not have been precluded as "contradictory" evidence because in these statements, Rosas and Hurtado simply reject their prior inculpatory statements on the ground that they were procured by torture. Munoz's argument is foreclosed by *Barapind* because there, Ram's recantation also did not offer a competing factual narrative. *See* 400 F.3d at 749. Rather, Ram stated that he never identified Barapind and was forced by the police to sign a blank sheet of paper. *Id.* We nonetheless found no error in the extradition court's conclusion that it could not resolve the conflict between

[4] This conclusion is bolstered by the fact that, like in *Barapind*, Rosas and Hurtado had an incentive to falsely recant, as they presumably faced criminal liability stemming from their own participation in the alleged kidnapping. *Cf. In re Extradition of Singh*, 170 F. Supp. 2d at 1024 (noting the recanting witness's reasons for bias against the Indian government).

Ram's affidavits without a trial. *Id.* at 749–50. The same analysis applies here.

Next, Munoz contends that evidence procured by torture is necessarily not "competent evidence" that can support a determination of probable cause. It is beyond dispute that the use of evidence obtained by torture is "unspeakably inhumane," *Boumediene v. Bush*, 476 F.3d 981, 1006 (D.C. Cir. 2007) (Rogers, J., dissenting), *judgment vacated*, *Al Odah v. United States*, 282 F. App'x 844 (D.C. Cir. 2008), and evidence obtained by torture is inadmissible in domestic criminal proceedings, *cf. Crowe v. County of San Diego*, 608 F.3d 406, 433 (9th Cir. 2010). Here, however, we agree with the district court that the allegations of torture are "inextricably intertwined" with Rosas' and Hurtado's recantations. Each recantation includes both a disavowal of the witness's prior inculpatory statements, as well as allegations that the statements were procured by torture. Indeed, Munoz concedes that the district court correctly characterized the evidence as "inextricably intertwined," and that Rosas and Hurtado are essentially saying, "I was tortured so the things I said the first time are not credible." Thus, in order to evaluate Rosas' and Hurtado's torture allegations, the extradition court would necessarily have had to evaluate the veracity of the recantations and weigh them against the conflicting inculpatory statements. Doing so would have exceeded the limited authority of the extradition court. *See Barapind*, 400 F.3d at 749–50; *Quinn*, 783 F.2d at 815.

We recognize that several extradition courts in this Circuit have, at times, elected not to rely on evidence allegedly obtained by torture, or have considered allegations of torture but found them to be unreliable. *See Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1008 (9th Cir. 2000),

overruled on other grounds, *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012); *Mainero*, 164 F.3d at 1206 (noting that the extradition court considered allegations of torture, but ultimately found that there was "no reliable evidence of torture or duress"). Indeed, Munoz cites a different passage in *Barapind*, where we endorsed the extradition court's "incident-by incident" consideration of whether certain evidence was fabricated or procured by torture. *See* 400 F.3d at 748. Some courts in other circuits have taken similar approaches. *E.g.*, *Atuar v. United States*, 156 F. App'x 555, 563 (4th Cir. 2005) (noting that the extradition court "correctly considered" evidence that a prior inculpatory statement was obtained by torture, but found that evidence to be less reliable than the initial inculpatory statement); *Matter of Extradition of Contreras*, 800 F. Supp. 1462, 1469 (S.D. Tex. 1992) (finding recantations alleging torture to be more credible than initial inculpatory statements).

However, none of these cases stands for the proposition that an extradition court must accept as true allegations of torture whenever they are raised, nor do they endorse the weighing of evidence by an extradition court. Rather, these cases reflect the highly fact-intensive nature of these proceedings, and the well-established principle that "[a]dmission of evidence proffered by the fugitive at an extradition proceeding is left to the sound discretion of the [extradition] court." *Hooker*, 573 F.2d at 1369. Under the appropriate circumstances, an extradition court *may* exercise its discretion to consider allegations of torture. But in a case like this one, where torture allegations are inextricably intertwined with the witnesses' recantations, the evidence was properly excluded because its consideration would require a mini-trial on whether the initial statements of Rosas and

Hurtado were procured by torture. *See Barapind*, 400 F.3d at 749–50.[5]

CONCLUSION

The extradition court did not abuse its discretion in excluding Rosas' and Hurtado's statements alleging torture as contradictory evidence. In turn, the district court properly denied Munoz's habeas petition because the extradition court's probable cause determination was supported by competent evidence.

AFFIRMED.

[5] The government asserts that any evidence proffered or relied on by a person facing extradition is per se inadmissible if it requires the extradition court to resolve a factual dispute as to any matter. We need not address this contention because we resolve the case on much narrower grounds, i.e., that Rosas' and Hurtado's allegations of torture were inadmissible, given that those allegations were inextricably intertwined with recantations.

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2015, I electronically filed the foregoing **APPELLANT'S PETITION FOR PANEL REHEARING AND/OR REHEARING *EN BANC*** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: May 14, 2015

s/ Matthew B. Larsen
MATTHEW B. LARSEN

No. 12-56506

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE LUIS MUNOZ SANTOS,
Petitioner-Appellant,

v.

LINDA R. THOMAS, WARDEN,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CV 11-6330-MMM

GOVERNMENT'S RESPONSE TO PETITIONER'S PETITION FOR REHEARING AND/OR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

DESCRIPTION **PAGE(S)**

Federal Cases

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

TABLE OF AUTHORITIES (continued)

DESCRIPTION **PAGE(S)**

Federal Statutes

Federal Rules

Other Authorities

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GOVERNMENT'S RESPONSE TO PETITIONER'S PETITION FOR REHEARING AND/OR REHEARING EN BANC

I

INTRODUCTION

The Mexican government firmly maintains that the evidence proffered in support of the extradition of Petitioner-Appellant Jose Luis Muñoz Santos (the "fugitive") was not procured by torture. And no court, either in the United States or Mexico, has found otherwise. To the contrary, the co-conspirator testimony in question was either made

under oath, in the presence of defense counsel, and preceded by the averment that it was made "with no coercion, physical or moral violence on the part of this office or on the part of the officers of the state police," or before a criminal court. The proffered evidence of torture is the self-serving recantations of the co-conspirators' confessions, which the co-conspirators now claim were coerced. The fugitive conceded below that the torture allegations are inextricably intertwined with these recantations and that evidence of recantations is wholly precluded from extradition proceedings. The fugitive acknowledged that resolving whether the confessions were coerced would require an evidentiary hearing (ER 266, 281),[1] which is prohibited under extradition law.

The fugitive's allegations that confessions were coerced are serious, but such allegations, when disputed, must be considered by the courts of the requesting country (here, Mexico), which have better access to the evidence, a greater ability to investigate the allegations

[1] "ER" refers to petitioner's Excerpts of Record; "PFR" refers to petitioner's Petition for Rehearing and/or Rehearing *En Banc*; "GAB" refers to the Government's Answering Brief; "AB" refers to the *Amici Curiae's* Brief in Support of the Petition for Rehearing; each is followed by the applicable page number.

fully, as well as an understanding of the applicable laws and rules of criminal procedure governing receipt of such evidence in their judicial system, rather than by the courts of the requested country operating in a limited extradition context. Extradition courts are legally barred from resolving such evidentiary disputes, and principles of separation of powers and international comity underscore why that bar makes sense. The panel's decision affirming the exclusion of disputed evidence, *Santos v. Thomas*, 779 F.3d 1021, 1023 (9th Cir. 2015), was correct, dictated by Supreme Court and Ninth Circuit precedent, and does not meet the Rule 35 criteria justifying rehearing *en banc*.

II

STATEMENT OF FACTS

In May 2006, the United States initiated extradition proceedings on behalf of Mexico, alleging that, in August 2005, the fugitive planned and participated in the kidnapping for ransom of a woman and her two young daughters, which resulted in the death of one of the daughters.[2]

[2] While the extradition case was pending, the fugitive successfully challenged the homicide charge in Mexican courts, and the Mexican government amended its extradition request to include only the kidnapping charge. (ER 28.)

A. The Extradition Hearing and Probable Cause Findings

United States Magistrate Judge Andrew J. Wistrich (the "extradition judge") held an extradition hearing on April 19, 2011 (ER 27), and issued a Certification of Extraditability and Order of Commitment on June 13, 2011 (ER 68). In his certification order, the extradition judge admitted and credited the five witness statements proffered by the government to demonstrate probable cause. (ER 34); *Santos*, 779 F.3d at 1023 (noting that certification was based upon five statements). Those statements came from the fugitive's alleged co-conspirators, Jesus Servando Hurtado Osuna ("Hurtado") and Fausto Librado Rosas Alfaro ("Rosas"); the adult kidnapping victim and mother of the two child victims, Dignora Hermosillo Garcia ("Hermosillo"); Hermosillo's husband, Roberto Castellanos Meza ("Castellanos"); and a person who was approached to join the kidnapping conspiracy but declined, Benigno Andrade Hernandez ("Andrade"). (ER 34-45.)[3]

Hermosillo provided a sworn statement that on August 18, 2005, she and her two minor daughters were kidnapped from their home in

[3] Contrary to the fugitive's assertion (PFR 3), the government did not proffer the statements alleging torture in its extradition request.

Mexico by an armed, masked man. (ER 36.) Hermosillo saw parts of the kidnapper's face as he drove away from the house. (*Id.*) The kidnapper later stopped the car to leave one of the daughters, bound, by the side of the road and made a second stop to abandon the second daughter as well.[4] (*Id.*) After obtaining Hermosillo's bank card and the phone number for Hermosillo's husband, the kidnapper left Hermosillo, still bound, by the side of the road at a third location. (ER 36-37.) Hermosillo eventually freed herself and contacted her husband. (ER 37.) Hermosillo gave a second sworn statement in which she identified a photograph of Rosas "without any doubt" as her kidnapper. (*Id.*)

Hurtado provided a sworn statement in which he implicated in the kidnapping scheme himself, the fugitive, Rosas, and another man and woman who were not charged in connection with the offense. (ER 39-41.) Hurtado further stated that he was making the statement "in the presence of my public defender, with no coercion, physical or moral violence on the part of this office or on the part of the officers of the

[4] One of the girls died before she could be rescued, and her death was the basis for the homicide charge that was subsequently dismissed by the Mexican court. (ER 28.) The other girl survived. (ER 75.)

state police." (ER 41.) Rosas submitted a signed statement, made before a criminal court judge, in which he admitted to kidnapping the victims and implicated the fugitive, Hurtado, and others in the scheme. (ER 42-45.)

Andrade voluntarily appeared before a prosecutor and gave a sworn statement that the fugitive and Rosas asked Andrade to participate in "pulling a 'job'" that involved asking "Beto"—Hermosillo's husband—for two million pesos, but Andrade declined to participate. (ER 38.)

The extradition judge concluded that Rosas and Hurtado "gave detailed statements inculpating themselves and [the fugitive] in the planning and execution of the kidnapping. The . . . statements of Rosas and Hurtado are competent evidence and contain indicia of reliability." (ER 45.) Among other indicia of reliability, the extradition judge noted that Rosas and Hurtado reported several consistent facts about the execution of the crime; Hurtado's statement was sworn and he was assisted by counsel when he gave it; Rosas made his statement before a criminal court judge; and Andrade's statement contained facts that corroborated facts recounted by Rosas and Hurtado. (ER 45-50.)

B. The Fugitive Attempts to Introduce Disputed Evidence

The fugitive sought to introduce evidence that, among other things, "the inculpatory statements made by Rosas and Hurtado . . . were obtained by torture . . . ; [] Rosas and Hurtado subsequently recanted those inculpatory statements; and [] the recantations are more reliable than the inculpatory statements." (ER 53.) The extradition judge excluded this evidence on the ground that the fugitive's "proposed witnesses' testimony is offered to contradict the version of the facts set forth in the inculpatory statement and to provide a competing, conflicting version of the facts." (ER 64.)

C. The Panel Held That the Extradition Judge Did Not Abuse His Discretion in Excluding Disputed Evidence That Was Inextricably Intertwined with Recantations

After the extradition judge certified the fugitive as extraditable, the fugitive filed a Petition for a Writ of Habeas Corpus ("Habeas Petition") in which, in pertinent part, the fugitive challenged the extradition judge's exclusion of the torture allegations. (ER 3.) The district court denied the Habeas Petition (ER 26), and the fugitive appealed that decision to this Court. The undivided panel (Judge Nguyen, writing, joined by Judge Schroeder and visiting Judge

Zouhary) affirmed denial of the Habeas Petition, holding that the extradition judge was within his discretion to exclude the disputed torture allegations because they were inextricably intertwined with recantation evidence. *Santos*, 779 F.3d at 1027-28. The panel noted that "[u]nder the appropriate circumstances, an extradition court *may* exercise its discretion to consider allegations of torture," though not where "consideration [of the evidence] would require a mini-trial." *Id.* at 1027. Here, the circumstances did not *compel* the judge to consider the disputed allegations. *Id.* The panel based this holding on a thorough review of extradition precedent, *id.* at 1024-26, including *Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2005) (*en banc*), which made clear that "extradition courts do[] not weigh conflicting evidence in making their probable cause determinations." *Id.* at 749-50 (internal quotation marks omitted).

III

ARGUMENT

A. The Panel Properly Affirmed the Extradition Judge's Exclusion of the Fugitive's Recantation Evidence

1. The Extradition Habeas Process Is Sharply Limited By Precedent, Statute, Treaty, and Separation of Powers and Comity Principles

The extradition process begins with the political branches' decision to enter into an extradition treaty, a decision that rests on those branches' determination that the foreign country's legal and penal system is one into which the United States is willing to extradite fugitives. "[I]t is for the[se] political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." *Munaf v. Geren*, 553 U.S. 674, 700-01 (2008). As the Supreme Court recently explained:

> The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area. . . . In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture . . . .

Id. at 702. The political branches do not lightly enter into extradition treaties, and once they do, reciprocal obligations and principles of comity follow.

One of those obligations—reflecting an important comity principle and codified in 18 U.S.C. §§ 3181-3195—is that "judicial officers conduct a circumscribed inquiry in extradition cases." *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1208 (9th Cir. 2003). Extradition judges do not hold trials on the fugitive's guilt, or resolve evidentiary challenges, or look past the evidence to whether the legal procedures in the requesting country are akin to those of the United States. "It is not the business of [United States] courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir. 1976). As the Second Circuit explained with some force in the context of a fugitive's claims that he would be tortured if extradited to the requesting country, "consideration of the procedures that will or may occur in the requesting country is not within the purview of a [U.S. court]." *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990). In fact, it is "improper" for the court to make that sort of

examination: "[t]he interests of international comity are ill-served by requiring a foreign nation such as [Mexico] to satisfy a United States [court] concerning the fairness of its laws and the manner in which they are enforced." *Id.* at 1067. The same concerns counsel against U.S. judges conducting inquiries into the manner in which evidence has been obtained in a foreign country. *See Koskotas v. Roche*, 931 F.2d 169, 174 (1st Cir. 1991) ("Extradition proceedings are grounded in principles of international comity, which would be ill-served by requiring foreign governments to submit their purposes and procedures to the scrutiny of United States courts."). It is for the courts in the requesting country to determine whether law enforcement agents in that country have procured evidence improperly and, if so, whether any impropriety so taints the evidence that it should not be considered in the underlying judicial proceedings.

Thus, an extradition judge may not deny extradition on the ground that the requesting country will not provide a fugitive the procedures and rights available in a U.S. criminal case, even if those rights are guaranteed under the U.S. Constitution. *Neely v. Henkel*, 180 U.S. 109, 123 (1901). Nor may a judge entertain challenges that a

requesting country has not followed its own laws in bringing a criminal case or extradition request. *Skaftouros v. United States*, 667 F.3d 144, 155-56 (2d Cir. 2011). As the Supreme Court explained over a century ago—in a far more difficult case than this one—U.S. courts "are bound by the existence of an extradition treaty to assume that the [foreign] trial will be fair." *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911) (extradition of Jewish fugitive to tsarist Russia); *cf. Munaf*, 553 U.S. at 700-02; *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 978 (9th Cir. 2012).

2. U.S. Courts Must Exclude Evidence That Contradicts the Extraditing Country's Proffered Evidence

Under the Extradition Treaty Between the United States and Mexico, signed May 4, 1978, 31 U.S.T. 5059, to meet the standard for certification, the evidence must only establish probable cause that the fugitive committed the charged offense. *See, e.g.*, *Emami v. U.S. Dist. Court for N. Dist.*, 834 F.2d 1444, 1447 (9th Cir. 1987). Moreover, "[t]his circuit has held that the self-incriminating statements of accomplices are sufficient to establish probable cause in an extradition hearing." *Zanazanian v. United States*, 729 F.2d 624, 627 (9th Cir. 1984).

An extradition hearing resembles a preliminary hearing or grand jury investigation into the existence of probable cause, *see, e.g.*, *Benson v. McMahon*, 127 U.S. 457, 463 (1888) (an extradition hearing is "of the character of [a] preliminary examination" to determine whether to hold an accused to be tried on criminal charges), except that a fugitive's procedural rights are more limited, *see, e.g.*, *Bingham v. Bradley*, 241 U.S. 511, 517 (1916) (no right to cross-examination if witnesses testify at the hearing); *Eain v. Wilkes*, 641 F.2d 504, 511 (7th Cir. 1981) (no right to introduce contradictory or impeaching evidence). Because of the limited purpose of an extradition hearing and the comity owed other nations under an extradition treaty, a fugitive's ability to present evidence is very limited. In *Collins v. Loisel*, the Supreme Court held that a fugitive's right to present evidence must be sharply limited lest an extradition hearing become a contested trial:

> If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign

> country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties.

259 U.S. 309, 316 (1922). The Court further explained that evidence offered to "contradict" the government's evidence was not properly admitted under this standard. *Id.*

For that reason—and "[b]ecause extradition courts do not weigh conflicting evidence in making their probable cause determinations," *Barapind*, 400 F.3d at 749 (internal quotation marks and citation omitted)—a fugitive may not introduce evidence that contradicts the evidence submitted on behalf of the requesting country. In other words, the fugitive cannot offer evidence that would lead to an evidentiary dispute. *See Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978). As the fugitive concedes (PFR 7), this includes evidence of recantations of inculpatory statements. *See Barapind*, 400 F.3d at 750; *Eain*, 641 F.2d at 511-12 ("The alleged recantations are matters to be considered at the trial, not the extradition hearing.").

Only precluding evidentiary disputes can maintain the essential nature of extradition hearings, defined by the preliminary nature of the

proceeding, the practical fact that the relevant evidence and witnesses are located abroad, and the need for comity between the Treaty parties. To resolve disputed issues would compel the requesting country to send its evidence and witnesses to the United States, and requiring "the demanding government to send its citizens to another country to institute legal proceedings would defeat the whole object of the treaty." *Charlton v. Kelly*, 229 U.S. 447, 461 (1913); *Bingham*, 241 U.S. at 517; *Mainero v. Gregg*, 164 F.3d 1199, 1206 (9th Cir. 1999) ("[T]he very purpose of extradition treaties is to obviate the necessity of confronting the accused with the witnesses against him.") (internal quotation marks omitted).

3. The Torture Allegations Are Inextricably Intertwined With Recantation Evidence and Were Properly Excluded

While the fugitive now asserts that the torture allegations may be considered separately from the recantations (PFR 7, 12), he conceded below "that the district court correctly characterized the evidence as 'inextricably intertwined,' and that Rosas and Hurtado are essentially saying, 'I was tortured so the things I said the first time are not

credible.'" *Santos*, 779 F.3d at 1027; (ER 15). The panel thus correctly held that the extradition judge properly excluded all such evidence:

> [I]n order to evaluate Rosas' and Hurtado's torture allegations, the extradition court would necessarily have had to evaluate the veracity of the recantations and weigh them against the conflicting inculpatory statements. Doing so would have exceeded the limited authority of the extradition court.

Santos, 779 F.3d at 1027 (citing *Barapind*, 400 F.3d at 749-50; *Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir. 1986)).

The fugitive contends that *Barapind* supports his position that the recantations and torture allegations can be detached from each other.[5] (PFR 10-12.) He relies on a sentence in which the Court *rejected* the fugitive's argument that some evidence was unreliable "because it was fabricated or obtained by torture," but also (1) commented that the extradition judge had "conducted a careful, incident-by-incident analysis as to whether there was impropriety" on the part of the requesting government, and (2) held that the judge's findings that

[5] The fugitive cites the panel's decision in *Barapind* (PFR 11), but that decision "shall not be cited as precedent by or to this court . . . , except to the extent adopted by the *en banc* court," *Barapind v. Enomoto*, 381 F.3d 867 (9th Cir. 2004), and the *en banc* court did not adopt any of it, *see Barapind*, 400 F.3d at 744.

evidence supporting certain charges "was not the product of fabrication or torture were not clearly erroneous." (PFR 10 (quoting *Barapind*, 400 F.3d at 748).) Read in context, that sentence cannot carry the tremendous weight the fugitive asks it to bear.

To begin with, the *Barapind* Court was never asked whether evidence allegedly obtained under duress could be excluded. The extradition judge in *Barapind* admitted and considered such evidence, but nonetheless found probable cause on both charges without regard to Barapind's evidence because resolution of that disputed evidence would require an improper trial. 400 F.3d at 749, 752. Barapind appealed that probable cause finding, and the government never challenged the admission of the torture evidence. The question of whether the extradition judge was required to admit and consider such evidence simply was not before the Court. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

More importantly, *Barapind* did not—and could not—upend the decades of precedent, including Supreme Court precedent, holding that

a fugitive cannot submit contradictory evidence and an extradition judge cannot hold mini-trials to resolve evidentiary disputes. Thus, the panel in this case—after carefully analyzing *Barapind*—properly held that the decision required affirmance here. *Santos*, 779 F.3d at 1025-28. The fugitive's "evidence was properly excluded because its consideration would require a mini-trial on whether the initial statements of Rosas and Hurtado were procured by torture." *Id.* at 1027-28 (citing *Barapind*, 400 F.3d at 749-50).

4. Mexico Disputes the Fugitive's Torture Allegations

The Mexican government maintains that Hurtado and Rosas were not tortured (ER 16 (habeas judge noting proffer by government counsel that the claims of torture were unfounded)) and, notwithstanding the conclusory assertions of the fugitive (PFR 1) and *amici curiae* (AB 2, 3 n.4), there has never been a judicial finding to the contrary.[6] Rather,

[6] The fugitive's assertion that Mexico does not contest the allegations of torture (PFR 15) is false. (*See* ER 16.) Furthermore, the fugitive's argument that Mexico has not proffered evidence outside of the record to refute the fugitive's allegations "[i]n the nearly 9 years it has had to do so" (PFR 4) violates basic "Hornbook law that neither party can rely on evidence outside the record of the case on appeal." *Duran v. United States*, 413 F.2d 596, 605 (9th Cir. 1969).

the only evidence of torture in the record are Rosas's and Hurtado's self-serving allegations that their inculpatory statements were coerced. *See Santos*, 779 F.3d at 1026 n.4 (noting that Rosas and Hurtado had incentives to falsely recant).

The allegations of torture were properly excluded because they contradicted evidence proffered by the government and would have created an evidentiary dispute, independent of the torture allegations being inextricably intertwined with the recantations. (*See* GAB 31-36 (citing *Hooker*, 573 F.2d at 1368; *Barapind*, 400 F.3d at 749-50).) The panel, however, did not reach this broader question and instead expressly limited its holding to requiring the exclusion of evidence of duress when such evidence is inextricably intertwined with recantations. *Santos*, 779 F.3d at 1028 n.5.

5. The Fugitive's Torture Allegations Are Properly Considered by Mexican Courts

The responsibility for addressing the fugitive's torture allegations properly rests with Mexican, not U.S., courts. In addition to the well-established case law recognizing that the courts of the requesting country, with full access to the necessary evidence and witnesses, are better qualified to consider the fugitive's allegations, comity between

Treaty partners counsels deference. Consistent with the determination previously made by the Executive and Legislative branches, the Mexican legal system can be relied on to adjudicate the fugitive's claims fairly. Indeed, Mexican courts already granted the fugitive relief on the homicide charge that was originally brought against him. (*See* ER 28.) There is no reason to believe that the Mexican courts cannot fairly examine the allegations concerning the co-conspirators' statements.

B. The Panel Decision Does Not Conflict With Precedent

The fugitive contends that the panel's decision conflicts with the Supreme Court's decision in *Collins* and this Court's *en banc* decision in *Barapind*. (PFR 1.) As explained above, however, those decisions unambiguously support the government's position as they hold that an extradition judgment must exclude evidence that contradicts evidence proffered by a foreign country seeking extradition. *Collins*, 259 U.S. at 316; *Barapind*, 400 F.3d at 749. Moreover, the panel noted that *Barapind* is consistent with other circuits. *Santos*, 779 F.3d at 1026 n.2.

In addition, because there has not been a finding that any statements were procured through torture, this case does not present a

matter of exceptional importance and *en banc* review is unwarranted.

Fed. R. App. P. 35(a).[7]

[7] The Brief of the American Civil Liberties Union, American Civil Liberties Union of Southern California, Center for Constitutional Rights, Human Rights First, and Human Rights Watch as *Amici Curiae* in Support of the Petition for Rehearing, raises, for the first time, legal arguments concerning the treaty obligations of the United States - with respect to extradition proceedings. These arguments were never raised by the fugitive below or before the panel, and they have not been adopted by the fugitive even in his *en banc* petition. The Court therefore should not consider them. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) ("An *amicus curiae* generally cannot raise new arguments on appeal and arguments not raised by a party in an opening brief are waived.") (citation omitted); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 719 (9th Cir. 2003) ("In the absence of exceptional circumstances . . . we do not address issues raised only in an *amicus* brief."); 16AA Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3975.1 (4th ed. 2008) ("In ordinary circumstances, an amicus will not be permitted to raise issues not argued by the parties.").

IV

CONCLUSION

The panel correctly resolved this case according to controlling Supreme Court and Ninth Circuit precedent. The panel's holding creates no inconsistency within the Court nor does it conflict with any other circuit. For the reasons set forth above, the Court should deny the fugitive's petition.

DATED: July 27, 2015

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) and 32(a)(7)(B), and Ninth Cir. R. 32-3(3), because it does not exceed 4,200 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief contains approximately 4,056 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word 2010.

DATED: July 27, 2015

/s/ Aron Ketchel

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9th Circuit Case Number(s) 12-56506

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